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No. 03-915

# In the Supreme Court of the United States

DEFENDERS OF WILDLIFE, ET AL., PETITIONERS

*v.*

WILLIAM T. HOGARTH, ASSISTANT ADMINISTRATOR, FISHERIES NATIONAL MARINE FISHERIES SERVICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*
PETER D. KEISLER
*Assistant Attorney General*
DAVID M. COHEN
JEANNE E. DAVIDSON
M. ALICE THURSTON
STEPHEN C. TOSINI
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

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## QUESTION PRESENTED

Whether the Department of Commerce, in its interim-final rule implementing the International Dolphin Conservation Program Act, 16 U.S.C. 1413, acted within its statutory authority in adopting a requirement that fishing vessels, by 30 minutes after sundown, complete the backdown procedure for releasing dolphins captured in purse seine fishing nets.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 330 F.3d 1358. The opinion of the Court of International Trade (Pet. App. 35a-54a) is reported at 177 F. Supp. 2d 1336.

### JURISDICTION

The judgment of the court of appeals was entered on June 4, 2003. A petition for rehearing was denied on September 25, 2003 (Pet. App. 55a-59a). The petition for a writ of certiorari was filed on December 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

## STATEMENT

1. a. In 1972, Congress enacted the Marine Mammal Protection Act of 1972 (MMPA), Pub. L. No. 92-522, 86 Stat. 1027 (16 U.S.C. 1361 *et seq.*). The principal purpose of the MMPA was to protect marine mammals by, *inter alia*, establishing a ban upon "the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." MMPA § 101(a)(2), 86 Stat. 1030 (16 U.S.C. 1371(a)(2)).

Congress amended the MMPA in 1984. See Act of July 17, 1984, Pub. L. No. 98-364, 98 Stat. 440. The amendments required governments of nations that export yellowfin tuna harvested in the "purse seine" fishery in the eastern tropical Pacific Ocean (ETP)[1] to provide documentary evidence that they have adopted a regulatory program governing the taking of marine mammals that is comparable to that of the United States and that the average rate of incidental taking of the harvesting nations is comparable to that of the

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[1] A "purse seine" is a type of commercial fishing net that is placed in the water around a school of fish. Once the net is lowered into the water, it hangs much like a curtain around the school. A drawstring around the bottom of the net is then closed, capturing the target fish, as well as any non-target species caught in the net. One strategy used by purse seine fishermen in the ETP is to deploy their nets around groups of dolphins because dolphins tend to swim above schools of tuna in that region. In the early 1970s, an estimated 350,000 dolphins were killed annually in the ETP purse seine fishery. By 1998, dolphin mortality was reduced to approximately 2000 per year. See generally *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding*, 64 Fed. Reg. 24,590 (1999); H.R. Rep. No. 74, 105th Cong., 1st Sess. Pt. 1, at 11-12 (1997).

United States. In 1988, Congress further amended the MMPA by specifying criteria that tuna harvesting nations must satisfy for their regulatory programs to be considered comparable to that of the United States. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, § 4, 102 Stat. 4765.

In 1990, Congress made it a violation of the Federal Trade Commission Act, 5 U.S.C. 41 *et seq.*, to label any tuna product as "dolphin-safe" if the product contains tuna harvested (i) upon the high seas by a vessel engaging in driftnet fishing, or (ii) in the ETP by a vessel using purse seines unless the product is accompanied by various statements demonstrating that no dolphin was intentionally encircled during the trip in which the tuna was caught. Dolphin Protection Consumer Information Act, Pub. L. No. 101-627, § 901, 104 Stat. 4465 (16 U.S.C. 1385).

In 1992, Congress amended the MMPA to: (1) impose a five-year moratorium upon the harvesting of tuna with purse seine nets deployed on or to encircle dolphins; and (2) lift the tuna embargo for those nations that made a declared commitment to implement the moratorium and take other steps to reduce dolphin mortality. International Dolphin Conservation Act of 1992 (IDCA), Pub. L. No. 102-523, 106 Stat. 3425. No nation issued a statement of intent to honor the provisions of the IDCA. H.R. Rep. No. 74, 105th Cong., 1st Sess. Pt. 1, at 14 (1997).

b. In June 1992, the United States and certain other nations entered into a non-binding agreement (the La Jolla Agreement) that set forth a wide range of undertakings to protect dolphins from harm in the ETP purse seine fishery, including a schedule for significant reductions in dolphin mortality. Pet. App. 141a-151a. In October 1995, the United States and eleven other

nations signed the Panama Declaration, which formalized, modified, and enhanced the La Jolla Agreement. The Panama Declaration contained statements of intent to establish an International Dolphin Conservation Program (IDCP). Pursuant to the Panama Declaration, other nations committed to strengthen the protection of dolphins and to negotiate a new binding agreement to establish an IDCP, but only if the United States amended its laws to: (1) lift the embargoes imposed under the MMPA; (2) permit the sale of both dolphin-safe and non-dolphin safe tuna in the U.S. market; and (3) change the definition of "dolphin-safe tuna" to mean "tuna harvested without dolphin mortality." *Id.* at 152a-161a.

c. In 1997, Congress enacted the International Dolphin Conservation Program Act (IDCPA), Pub. L. No. 105-42, 111 Stat. 1122. The three purposes of the IDCPA were to: (1) give effect to the intent of the Panama Declaration that the United States negotiate a binding agreement to establish the IDCP; (2) recognize that nations involved in the ETP tuna fishery have achieved significant reductions in dolphin mortality; and (3) end the ban on imports of tuna from nations that comply with the IDCP. IDCPA § 2, 111 Stat. 1122. The IDCPA directed the Secretary of State, in consultation with the Secretary of Commerce, to "seek to secure a binding international agreement to establish an International Dolphin Conservation Program." 16 U.S.C. 1412. The IDCPA also amended the MMPA to permit a nation to export tuna to the United States if the nation provides documentary evidence that it: (1) participates in the IDCP and is a member (or applicant member) of the Inter-American Tropical Tuna Commission; (2) is meeting its obligations under the IDCP and the Inter-American Tropical Tuna Commission; and (3) does not

exceed certain dolphin mortality limits. 16 U.S.C. 1371(a)(2)(B).

The IDCPA gave the Secretary of Commerce authority to "issue regulations, and revise those regulations as may be appropriate, to implement the International Dolphin Conservation Program," 16 U.S.C. 1413(a)(1), including "regulations to authorize and govern the taking of marine mammals in the eastern tropical Pacific Ocean * * * by vessels of the United States," 16 U.S.C. 1413(a)(2)(A). The IDCPA prescribes that the regulations include a number of specific provisions, 16 U.S.C. 1413(a)(2)(B), including a provision "ensuring that the backdown procedure during sets of purse seine net on marine mammals is completed and rolling of the net to sack up has begun no later than 30 minutes before sundown," 16 U.S.C. 1413(a)(2)(B)(v).[2] The IDCPA also provides the Secretary with regulatory authority to adjust the requirements contained in 16 U.S.C. 1413(a)(2)(B) in accordance with the IDCP that is established through the binding international agreement that Congress directed be negotiated: "[t]he Secretary may make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program." 16 U.S.C. 1413(a)(2)(C).

The IDCPA became effective on the date that the Secretary of State certified that a binding instrument

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[2] "'Backdown' means the procedure for releasing captured dolphins by shifting the vessel's engine(s) into reverse during net retrieval, causing the net remaining in the water to form a channel, and the corkline at the apex of the channel to submerge." Agreement on the International Dolphin Conservation Program, Annex VIII.1.b (Pet. App. 205a).

establishing the IDCP has been adopted. Pub. L. No. 105-42, § 8, 111 Stat. 1139. "The Agreement on the IDCP became effective on February 15, 1999, after four nations (United States, Panama, Ecuador, and Mexico) deposited their instruments of ratification, acceptance, or adherence with the depository for the agreement." *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)*, 65 Fed. Reg. 30, 31 (2000) (*Interim-Final Rule*). The Agreement on the IDCP provided, *inter alia*, that covered vessels shall "[c]omplete backdown no later than thirty minutes after sunset." Agreement on the International Dolphin Conservation Program, Annex VIII.3.e (Pet. App. 207a).

d. On June 14, 1999, the Department of Commerce published a proposed rule implementing the IDCPA. *Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP)*, 64 Fed. Reg. 31,806 (1999). On January 3, 2000, after receiving and considering numerous comments, the Department issued the *Interim-Final Rule*, 65 Fed. Reg. at 30 (Pet. App. 92a-140a). In accordance with the agreement establishing the IDCP, the *Interim-Final Rule* prescribes that covered vessels complete "the backdown procedure" for purse seine nets "no later than one-half hour after sundown." 50 C.F.R. 216.24(c)(6)(iii) (Pet. App. 105a).

2. On February 8, 2000, petitioners filed an action in the Court of International Trade alleging that the *Interim-Final Rule* was contrary to the terms of the IDCPA. Pet. App. 9a. Petitioners argued, *inter alia*, that because the IDCPA states that the regulations shall "ensure[] that the backdown procedure during

sets of purse seine net * * * is completed * * * no later than 30 minutes *before* sundown," 16 U.S.C. 1413(a)(2)(B)(v) (emphasis added), the *Interim-Final Rule* was contrary to the IDCPA in providing that "the backdown procedure must be completed no later than one-half hour *after* sundown." Pet. App. 105a (emphasis added).

On December 7, 2001, the Court of International Trade issued a decision denying petitioners' claims. Pet. App. 35a-54a. In rejecting petitioners' challenge to the time for completing sundown sets, the court explained that "the IDCPA is a culmination of a quarter-century of legislative and administrative action, not legislation written on a blank slate." *Id.* at 50a. The court further explained that, "the relationship between the [IDCPA] and the [IDCP] inverts the traditional chronological order. Most international agreements receive congressional approval and implementing authority *after* they have been negotiated." *Ibid.* In contrast, "[t]he IDCPA gave *standing authority* to the executive branch to negotiate an international agreement and to issue regulations to implement the agreement, *without returning to Congress* for authorization." *Ibid.* The court concluded that, when the statutory "language is placed in the context of twenty-five years of legislative enactments and enforcement," the "congressional intent is clear" to "use the word 'after,' rather than 'before,' to establish the cut-off period for sundown sets." *Id.* at 52a.

3. The court of appeals affirmed. Pet. App. 1a-34a. The court did not rely on the conclusion of the Court of International Trade that Congress had mistakenly used the word "before" rather than "after." *Id.* at 16a. The court instead relied on the Secretary's authority under the IDCPA to "make such adjustments as may be

appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the International Dolphin Conservation Program." 16 U.S.C. 1413(a)(2)(C); see Pet. App. 16a-17a. The court explained that the National Marine Fisheries Service (NMFS) of the Department of Commerce "was authorized to alter the backdown procedure in the IDCPA" because the "period for permissible sundown sets is a fishing practice subject to section 1413(a)(2)(C)." *Id.* at 17a. The court further reasoned that "the International Agreement creating the IDCP states that the backdown procedure must be completed no later than one half hour after sunset," and that, pursuant to the terms of the statute, "NMFS was authorized to draft the Interim-Final Rule in a manner consistent with the IDCP." *Ibid.*

The court rejected petitioners' argument that, under *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), the Secretary was barred from relying on Section 1413(a)(2)(C) because the *Interim-Final Rule* had not specifically relied on that provision. Pet. App. 17a-18a. The court explained that NMFS, in response to comments, had "relied on the International Agreement creating the IDCP as support for the Interim-Final Rule and relied on the fact that the Interim-Final Rule is consistent with the International Agreement." *Id.* at 18a. The court further explained that, unlike in *Chenery*, the court was not required to make any factual findings in the first instance, but instead was "called upon to determine whether NMFS had the authority under [Section 1413(a)(2)(C)] to issue the Interim-Final Rule as drafted." *Ibid.*

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review therefore is unwarranted.

1. a. The IDCPA directs the Secretary of State, in consultation with the Secretary of Commerce, to "seek to secure a binding international agreement to establish an International Dolphin Conservation Program." 16 U.S.C. 1412. Although Congress required that regulations implementing the IDCP include certain provisions —including one ensuring that the backdown procedure for purse seine nets must be completed "no later than 30 minutes before sundown," 16 U.S.C. 1413(a)(2)(B)(v) —Congress made clear that the Secretary of Commerce had authority to adjust those requirements insofar as would be consistent with the terms of the IDCP to be established by international agreement: "The Secretary may make such adjustments as may be appropriate to requirements of subparagraph (B) that pertain to fishing gear, vessel equipment, and fishing practices to the extent the adjustments are consistent with the [IDCP]," 16 U.S.C. 1413(a)(2)(C). To the same effect, in granting the Secretary authority to "issue regulations," the IDCPA provides that the Secretary "shall * * * revise those regulations as may be appropriate, to implement the [IDCP]." 16 U.S.C. 1413(a)(1).

The international agreement establishing the IDCP provides that covered vessels shall "[c]omplete backdown no later than thirty minutes after sunset." Pet. App. 207a. Petitioners do not dispute the court of appeals' conclusion that the time for completing the backdown procedure constitutes a "fishing practice" within the meaning of Section 1413(a)(2)(C). *Id.* at 17a. As a

result, the Secretary has authority under the plain terms of Section 1413(a)(2)(C) to conform the implementing regulations to the "thirty minutes after sunset" standard established in the IDCP. *Id.* at 207a.

b. There is no merit to petitioners' reliance (Pet. 12-14) on the interpretive canon that specific statutory language governs over more general language. Here, the ostensibly "general" language in Section 1413(a)(2)(C) in fact specifically and explicitly authorizes the Secretary to make adjustments to the "requirements" of 16 U.S.C. 1413(a)(2)(B), which include the requirement concerning the time for completing the backdown procedure for purse seine nets. Indeed, it is petitioners' construction of the statute that fails to "give effect to every clause and word of the statute" (Pet. 12), by disregarding the statute's grant of authority to negotiate a binding international agreement establishing an IDCP and to make adjustments harmonizing the regulations with the provisions of any agreement reached. None of the decisions on which petitioners rely (Pet. 12-14) involved a comparable grant of specific statutory authority.

Petitioners' reliance (Pet. 17) on *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and *Motor Vehicles Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), is misplaced. This Court has held that an agency need not cite the exact source of its authority to act if its authority is clear from the statute. In *Massachusetts Trustees* v. *United States*, 377 U.S. 235 (1964), the Court sustained a provision adopted by the Maritime Commission even though the agency had cited the wrong statute as its authority. The Court rejected a challenge based on *SEC* v. *Chenery*, *supra*, explaining that "the Commission's failure to indicate explicitly or implicitly that [the correct] section

was the source of its power is without legal significance." 377 U.S. at 248.

2. Contrary to petitioner's argument (Pet. 17-20), Congress's grant of authority to the Secretary to make adjustments to regulatory requirements does not infringe the Presentment Clause. Congress possesses the authority to direct an agency to conduct negotiations with foreign countries in the hope of reaching an agreement concerning issues within the agency's regulatory authority. U.S. Const. Art. I. § 8, Cl. 3 (Congress possesses power to "regulate Commerce with foreign Nations"). Congress therefore also possesses the authority to grant the agency regulatory authority to adopt regulations reflecting the terms of any agreement reached. This Court has explained that the lawmaking procedures required by the Presentment Clause are "not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I, §§ 1, 7." *INS* v. *Chadha*, 462 U.S. 919, 953 n.16 (1983). Here, "the limits of the statute that created" the authority to issue the *Interim-Final Rule* are set forth in 16 U.S.C. 1413(a)(2)(C), and they specifically allow the Secretary to make adjustments consistent with any international agreement ultimately reached on an IDCP.

In *Field* v. *Clark*, 143 U.S. 649 (1892), importers challenged the constitutionality of a section of the Tariff Act of 1890 that authorized the President to "suspend" the Act's provisions (thereby raising tariffs) if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs upon certain commodities. The importers argued that the suspension provision unconstitutionally dele-

gated lawmaking power to the President. *Id.* at 681. This Court rejected that argument, observing that the President's power to suspend the provisions of the Tariff Act "was a part of the law itself as it left the hands of Congress," and that "[t]he true [constitutional] distinction * * * is between the delegation of power to make the law * * * and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Id.* at 693-694 (citation and internal quotation marks omitted). In this case, the authority to issue regulations upon reaching an agreement with other nations involved in the ETP tuna fishery likewise was "a part of the law itself as it left the hands of Congress." *Id.* at 693.

Petitioners err in relying (Pet. 17-20) on *Clinton* v. *New York*, 524 U.S. 417 (1998). In that case, the Court concluded that the Line Item Veto Act of 1996, 2 U.S.C. 691 *et seq.*, violated the Presentment Clause. The "decision rest[ed] on the narrow ground that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution" because the Act "would authorize the President to create" a law "whose text was not voted on by either House of Congress or presented to the President for signature." *Id.* at 448. The Court distinguished the Tariff Act at issue in *Field* on several grounds, including that "the exercise of the suspension power [under the Tariff Act] was contingent upon a condition that did not exist when the Tariff Act was passed," *id.* at 443, and that "whenever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress had embodied in the statute," *id.* at 444. Here, likewise, the contingency that allowed the Secretary to adjust the sundown rule was the signing of the agreement on the IDCP two years after the passage of the IDCPA, and Congress

intended that the Executive reach an international agreement with other nations involved in the ETP tuna fishery and that the implementing regulations reflect the terms of that agreement. See, *e.g.*, IDCPA § 8, 111 Stat. 1139 (declaring IDCPA effective upon entry into a legally binding agreement); H.R. Rep. No. 74, 105th Cong., 1st Sess. Pt. 2, at 5 (1997) (stating sense of Congress "that enforcement actions are often the most effective when they are based on international consensus, and that such consensus would be more constructive to effective management of the ETP tuna fishery by all countries concerned"). See also 16 U.S.C. 1378(a)(2)(B), 1412.[3]

The IDCPA therefore does not allow the Executive Branch to effect the repeal of laws in contravention of the procedures required by the Presentment Clause. Rather, the IDCPA "confer[s] authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Field*, 143 U.S. at 694 (citation omitted). That conclusion is reinforced by the Court's recognition

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[3] The Court observed in *Clinton* v. *New York* that, under the Tariff Act upheld in *Field*, "when the President determined that the contingency had arisen, he had a duty to suspend." 524 U.S. at 443. In this case, while the Secretary has discretion to promulgate "appropriate" adjustments consistent with the Agreement on the IDCP, Congress mandated that the Secretary of Commerce "initiate * * * discussions with foreign governments" involved in the ETP tuna fishery, 16 U.S.C. 1378(a)(2)(B), and that the Secretary of State, in consultation with the Secretary of Commerce, "shall seek to secure a binding international agreement to establish an International Dolphin Conservation Program," 16 U.S.C. 1412. Congress's direction to attempt to negotiate a *binding* agreement entailed an obligation to implement the agreement through consistent regulations. See 16 U.S.C. 1413(a)(1) ("The Secretary *shall* issue regulations, and *revise those regulations as may be appropriate*, to implement the [IDCP].") (emphasis added).

in *Clinton* v. *New York* that the Executive, in implementing statutes that concern foreign affairs, possesses "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." 524 U.S. at 445 (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)). Here, the purpose of the IDCPA is to develop rules governing international trade in tuna caught in the ETP purse seine fishery and to foster international cooperation in protecting stocks of highly migratory marine mammals on the high seas. Accordingly, issuance of regulations "consistent with the International Dolphin Conservation Program" (16 U.S.C. 1413(a)(2)(B)) is a permissible exercise of the Executive Branch's discretion in foreign affairs.

3. Contrary to petitioners' assertion (Pet. 23-24), the court of appeals' decision does not conflict with *United States* v. *Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955), or *Swearingen* v. *United States*, 565 F. Supp. 1019 (D. Colo. 1983). In both cases, the courts declined to enforce the provisions of an international agreement on the ground that it was contrary to statutes enacted by Congress. Neither case involved a statute that itself granted authority to enter into an international agreement or to conform regulatory requirements to the terms of any such agreement. In this case, by contrast, the IDCPA directed the Executive to attempt to negotiate a binding international agreement establishing an IDCP and granted regulatory authority to the Secretary to adjust the sundown set rule and other requirements to conform to any agreement reached.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*
PETER D. KEISLER
*Assistant Attorney General*
DAVID M. COHEN
JEANNE E. DAVIDSON
M. ALICE THURSTON
STEPHEN C. TOSINI
*Attorneys*

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